

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:MAN:3:TL-N-2877-01
RLPeacock

date:

to: Richard Antoinette, Team Manager, Manhattan Appeals
Attention: Mel Rosenbach, Appeals Officer

from: Area Counsel (Financial Services & Healthcare) (Area 1: Manhattan)

subject: [REDACTED] ([REDACTED], [REDACTED] and [REDACTED])

STATUTES OF LIMITATION EXPIRE: [REDACTED]

UIL Nos. 6501.08-00 and 6501.08-17

INTRODUCTION

This memorandum responds to Paul Steindler's request for assistance via telephone on May 1, 2001. This memorandum should not be cited as precedent. Specifically, you have asked our office to provide you with the appropriate language to use on a Form 872 (Consent to Extend the Time to Assess Tax) ("Form 872") with respect to [REDACTED] (" [REDACTED] ") for the taxable years ending December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED].

ISSUES

1. Which entity is the proper entity to execute a Form 872 for [REDACTED] for the pre-merger taxable years ending December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED], after the effective date of the merger between [REDACTED] and [REDACTED]?
2. What specific language should be used on the Form 872 for [REDACTED] for the pre-merger taxable years ending December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED], after the effective date of the merger between [REDACTED] and [REDACTED]?

BACKGROUND

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon.

Merger"). [REDACTED] shall be the surviving corporation in the [REDACTED] Merger and shall continue its corporate existence under the laws of the State of Delaware. As a result of the [REDACTED] Merger, [REDACTED] shall become a wholly owned subsidiary of [REDACTED].

The merger agreement also provided that, as a result of the merger, holders of shares of [REDACTED] common stock would each receive [REDACTED] share of [REDACTED] stock. The holders of shares of [REDACTED] common stock, Series [REDACTED] stock and Series [REDACTED] common stock would each receive [REDACTED] shares of [REDACTED] common stock, [REDACTED] common stock and [REDACTED] common stock, respectively. The holders of shares of [REDACTED] Series E convertible preferred stock, Series F convertible preferred stock, Series I convertible preferred stock and Series J preferred stock received [REDACTED] share of [REDACTED] Series E convertible preferred stock, Series F convertible preferred stock, Series I convertible preferred stock and Series J preferred stock, respectively.

As a result of the merger, [REDACTED] and [REDACTED] became the wholly-owned subsidiaries of [REDACTED]. [REDACTED]'s shareholders owned approximately [REDACTED] % of [REDACTED]; [REDACTED]'s shareholders owned approximately [REDACTED] % of [REDACTED]. In addition, [REDACTED] Merger Sub and [REDACTED] Merger Sub, which were created solely for the purpose of acquiring [REDACTED] and [REDACTED], respectively, were merged out of existence. The merger was completed on [REDACTED].

On [REDACTED], prior to the effective date of the merger, [REDACTED] executed a Form 872 captioned "[REDACTED]" for the taxable years [REDACTED], [REDACTED] and [REDACTED]. This Form 872 was signed by [REDACTED], the Vice President of Taxes for [REDACTED]. Appeals executed the Form 872 on [REDACTED]. Based on this Form 872, the current statute of limitations expires on [REDACTED].

At issue is which entity may execute a Form 872 on behalf of the [REDACTED] consolidated group after the effective date of the merger between [REDACTED] and [REDACTED]. Also at issue is the proper language to use on a Form 872 executed after the effective date of the merger pertaining to [REDACTED]'s pre-merger tax years.

DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 8.1.1, chapter 3, provides procedures for processing consents to extend the statute of limitations on Assessment.

1. Which entity is the proper entity to execute a Form 872 on behalf of [REDACTED] for the taxable years [REDACTED], [REDACTED] and [REDACTED]?

The first issue is which entity is the proper entity to execute a Form 872 for [REDACTED] after the merger for the pre-merger taxable years ending December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED].

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent for corporations.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment for income tax can be found in the consolidated return regulations. See Treas. Reg. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c)(1).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. Treas. Reg. § 1.1502-77(a). See also, Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent

remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

Here, [REDACTED] has remained in existence. The merger agreement specifically provides, "[REDACTED] shall be the surviving corporation in the [REDACTED] Merger and shall continue its corporate existence under the laws of the State of Delaware." As a result, [REDACTED] is the proper party to execute the Form 872 with respect to the pre-merger income tax liability of [REDACTED] for the taxable years ending December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED].

Note, however, that there may be an alternative agent authorized under Treas. Reg. § 1.1502-77T who can execute the Form 872 on behalf of [REDACTED]^{1/}. Treas. Reg. § 1.1502-77T provides alternative agents for the purpose of extending the statute when the common parent of a group ceases to be a common parent, whether or not the common parent remains in existence. Under this provision, a waiver obtained from any one of several alternative agents is deemed to be given by the agent of the group. See Treas. Reg. § 1.1502-77T(a)(3). Treas. Reg. § 1.1502-77T(a)(4) sets forth the following alternative agents:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies;
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies;
- (iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d);
- (iv) If the group remains in existence after a reverse acquisition or downstream transfer, the common parent of the group at the time the waiver is given or the notice mailed.

[REDACTED] was the common parent for the group during the years at issue. As such, it may be treated as an alternative agent under Treas. Reg. § 1.1502-77T(a)(4)(i) with respect to new Forms 872 that it executes after it ceases to be the common parent of the group. [REDACTED] is an alternative agent for [REDACTED] for the taxable years at issue, pursuant to Treas. Reg. § 1.1502-77T(a)(4)(ii). Subparagraph (a)(4)(iii) does not

^{1/} The Service published proposed regulations on September 26, 2000 which terminate the application of Treas. Reg. § 1.1502-77T. See Prop. Reg. § 1.1502-77(a). The proposed regulations are not yet effective. See Prop. Reg. § 1.1502-77(h).

apply because no agent appears to have been designated by the group. Subparagraph (a)(4)(iv) does not apply because it does not appear that there was a reverse acquisition or downstream transfer since the shareholders of [REDACTED] did not own over [REDACTED] % of [REDACTED] at the completion of the merger.

Treas. Reg. § 1.1502-77T(4)(ii) provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381 applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraphs A, C, D, F or G of section 368(a)(1). If the subject merger is a tax-free reorganization within the meaning of sections 361 and 368(a)(1), then section 381 will apply to the merger.

To qualify as a tax-free reorganization under section 368(a)(1), the following requirements must be met: First, the transaction must be structured as a Type A, C, D, F, or G reorganization. I.R.C. § 368(a)(1). Second, there must be continuity of proprietary interest. Treas. Reg. § 1.368-1(b). Third, the restructuring must have been pursuant to a plan of reorganization. I.R.C. §§ 354 and 361. Fourth, there must be a business purpose for the reorganization. Treas. Reg. § 1.368-1(c). Finally, there must be continuity of business enterprise. Treas. Reg. § 1.368-1(d).

In the subject case, it appears that the above requirements have been met. First, the merger is a Type A reorganization because it is the merger of [REDACTED] Sub into [REDACTED] with [REDACTED] emerging as the surviving corporation, and the merger of [REDACTED] Sub into [REDACTED], with [REDACTED] emerging as the surviving corporation, resulting in [REDACTED]'s ownership of both [REDACTED] and [REDACTED], pursuant to the corporation laws of the State of Delaware. See Treas. Reg. § 1.368-2(b)(1). Second, [REDACTED] retained a sufficient proprietary interest in [REDACTED] because it exchanged its stock for the stock of [REDACTED]. See Treas. Reg. § 1.368-1(e)(1). Third, the restructuring was pursuant to a plan of reorganization as evidenced by the Merger Agreement. Fourth, the business purpose of the reorganization is evident because there appears to be no purpose for the merger, other than a business purpose. Finally, there is continuity of business enterprise since there has been no indication that [REDACTED] will not continue [REDACTED]'s previous business activities. See 12 U.S.C. § 214b.

In view of the foregoing, the merger appears to be a reorganization within the meaning of section 368(a)(1)(A)^{2/}. Therefore, [REDACTED] would be the successor to [REDACTED] in a transaction to which section 381 applies. [REDACTED] would then be an alternative agent for purposes of entering into an agreement to extend the statute of limitations on assessment for the [REDACTED] consolidated group for the tax years at issue pursuant to Treas. Reg. § 1.1502-77T(a)(4)(ii).

After the effective date of the merger, although [REDACTED] would be an appropriate alternative agent to sign the Forms 872 on behalf of [REDACTED] and subsidiaries, the proposed regulations eliminate the alternative agent rules in an effort to provide certainty as to who may execute Forms 872 on behalf of consolidated groups. We therefore recommend that future Forms 872 for the income tax liability of [REDACTED] and its subsidiaries for the taxable years [REDACTED], [REDACTED], and [REDACTED] continue to be executed by [REDACTED], consistent with the guidelines set forth in Treas. Reg. § 1.1502-77(a) and Prop. Reg. § 1.1502-77(a)(9/26/00). Although the proposed regulations are not yet in effect, they reflect the preferred thinking of the Service.

The regulations under section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of a corporate return, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The representatives of [REDACTED] authorized to execute Forms 872 are the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer authorized to act.

2. What specific language should be used on the Form 872?

The second issue is what language should be used on the Form 872 for [REDACTED].

The caption on the Form 872 extending the statute of limitations for [REDACTED]'s [REDACTED], [REDACTED] and [REDACTED] income tax liabilities should read, "[REDACTED]."

^{2/} For purposes of this memorandum, however, we do not express any opinion as to the proper tax treatment of the merger.

After the word "Subsidiaries" in the caption, insert an asterisk. At the bottom of the first page of the Form 872, insert the following language:

"*This is with respect to the consolidated income tax liability of [REDACTED] (EIN [REDACTED]) and affiliated subsidiaries consolidated group for the taxable years ending December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED]."

If [REDACTED] was a partner in any partnerships during the taxable years at issue, and if the statute on partnership item adjustments is still open, you should obtain an executed Form 872-I, rather than a Form 872, which includes the following pre-printed language:

Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b) but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1), above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

Should you have any questions regarding this matter, please contact Robin L. Peacock at (212) 264-1595, extension 246.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel
(Financial Services and
Healthcare: Manhattan)

By: _____
THEODORE R. LEIGHTON
Associate Area Counsel